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9  
10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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14 **VAHE SARKISSIAN, M.D. ,**

15 Plaintiff,

16 v.

17 **MEDICAL BOARD OF CALIFORNIA,**

18 Defendant  
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C11-01176 EMC

**NOTICE OF MOTION AND MOTION  
TO DISMISS BY DEFENDANT  
MEDICAL BOARD OF CALIFORNIA;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Date: June 29, 2011  
Time: 10:30 a.m.  
Courtroom: 5, 17th Floor  
Judge Hon. Edward M. Chen  
Trial Date None  
Action Filed: March 10, 2011

22 **TO VAHE SARKISSIAN, M.D., IN PRO SE:**

23 **PLEASE TAKE NOTICE** that on June 29, 2011, at 10:30 a.m. or as soon thereafter as  
24 counsel may be heard in Courtroom 5 of the above entitled court, located at 450 Golden Gate  
25 Avenue, 15th Floor, San Francisco, California, defendant Medical Board of California will and  
26 hereby does move this Court for an order, under Federal Rules of Civil Procedure, Rule 12 (b),  
27 dismissing Plaintiff's entire Complaint for lack of subject matter jurisdiction and because the  
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1 Complaint fails to state a claim upon which relief may be granted for the following specific  
2 reasons:

3 1. The Eleventh Amendment bars suits in federal court against states and state agencies  
4 for alleged violations of constitutional rights.

5 2. Plaintiff's action is barred by the Younger Abstention doctrine, which precludes  
6 federal district court review of pending state administrative proceedings.

7 3. The Medical Board is shielded by absolute quasi-prosecutorial immunity.

8 This motion will be based on this notice of motion; the attached memorandum of points and  
9 authorities filed in support thereof; on such oral and documentary evidence as shall be introduced  
10 at the time of the hearing; and on all papers and pleadings on file herein.

11 Dated: May 20, 2011

Respectfully submitted,

12 KAMALA D. HARRIS  
13 Attorney General of California  
14 TYLER B. PON  
Supervising Deputy Attorney General

15 /s/ **WIL FONG**

16 \_\_\_\_\_  
17 WIL FONG  
18 Deputy Attorney General  
19 *Attorneys for Defendant Medical Board of*  
20 *California*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **PRELIMINARY STATEMENT**

3 **A. Parties and Nature of Case**

4 This is an action for monetary damages and equitable relief brought by Plaintiff Vahe  
5 Sarkissian, M.D., in pro se. The Defendant is the Medical Board of California (hereafter Medical  
6 Board).

7 Plaintiff is a licensed physician and alleges that on February 8, 2011, the Medical Board  
8 issued an order compelling Plaintiff to submit to a psychological examination. Plaintiff  
9 complains that the Medical Board's Order is "illegal and unconstitutional" because Plaintiff was  
10 not provided with any petition or notice of the allegations for the examination. (Complaint, 2:9-  
11 13, 2:27 - 3:3.)

12 Plaintiff's Complaint asserts one cause of action for violation of civil rights under 42  
13 U.S.C. section 1983.

14 Defendant Medical Board now moves to dismiss the Complaint under Fed.Rule.Civ.Proc.  
15 12(b) on the grounds that this Court lacks jurisdiction, and the Complaint fails to state facts  
16 sufficient to state a claim to relief.

17 **B. Procedural Background, Administrative Proceedings and On-Going State**  
18 **Court Review**

19 The Medical Board of California is vested with the authority to license and regulate  
20 physicians practicing in the State of California pursuant to California Business and Professions  
21 Code § 2001, et seq. By statutory directive, the Medical Board's highest priority is to protect the  
22 public through licensing, regulating and disciplining practicing physicians. (Bus.&Prof. Code §§  
23 2001.1, 2004)

24 Under Bus.&Prof. Code § 820, the Medical Board can order the psychological evaluation of  
25 a licensed physician "whenever it appears that any person holding a license ... may be unable to  
26 practice his or her profession safely because the licentiate's ability to practice is impaired due to  
27 mental illness." A licensed physician's refusal to comply with the Medical Board's Order  
28 constitutes grounds for discipline. (Bus.&Prof. Code § 821.) If the Medical Board decides to

1 take disciplinary action against a physician, the procedures set forth in Bus.&Prof. Code §§ 821-  
2 828, and Cal. Gov. Code § 11500, et seq., apply, which provide for administrative adjudication in  
3 a formal hearing before an administrative law judge. The administrative law judge's decision is  
4 subject to state-court judicial review by mandate petition under Gov. Code §11523 and Cal. Code  
5 of Civ. Proc. § 1094.5.

6 As alleged in the Complaint, on February 8, 2011, the Medical Board ordered Plaintiff to  
7 undergo a mental examination after it determined that Plaintiff "may be mentally ill to the extent  
8 that his condition affects his ability to practice medicine safely." (Complaint, 2:9-10, Exhibit 1.)

9 Plaintiff has refused to comply with the Medical Board's Order. Consequently, on April 6,  
10 2011, the Medical Board filed an Accusation against Plaintiff for failing to comply with the  
11 Medical Board's Order. (See accompanying Request to Take Judicial Notice, Item 1., Exhibit A.)  
12 The Medical Board's Administrative Accusation is now pending before the Office of  
13 Administrative Hearings in Oakland, California. (See accompanying Request to Take Judicial  
14 Notice, Item 2, Exhibit B.)

15 **C. Statement of Issues to Be Decided in This Motion**

16 This motion to dismiss presents the following issues to be decided:

- 17 1. Does the Eleventh Amendment bar Plaintiff's claim against the Medical Board of  
18 California, which is an agency of the State of California?
- 19 2. Is this action barred by the Younger Abstention doctrine, which precludes federal  
20 district court review of pending state administrative proceedings?
- 21 3. Is the Medical Board entitled to absolute quasi-judicial immunity?

22 Defendant submits that the answer to the questions presented is yes, and, accordingly, the  
23 Court should grant this motion to dismiss.

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## ARGUMENT

### I. THE ELEVENTH AMENDMENT BARS PLAINTIFFS' CLAIMS AGAINST THE STATE AND STATE AGENCIES

42 U.S.C. § 1983 provides a private cause of action for the alleged deprivation of constitutional and federal rights, but it does not provide a forum for litigants who seek a remedy against a state, state agency or state officials acting in their official capacities. (*Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66, 71 (1989); *Leer v. Murphy*, 844 F.2d 628, 631 (9th Cir. 1988).)

The Eleventh Amendment bars such suits in federal court unless the defendant has specifically waived this immunity, or Congress has exercised its power under the Fourteenth Amendment to override that immunity. (*Will v. Michigan Dept. of State Police*, *supra*, 491 U.S. at 66.) Waiver of a state official's Eleventh Amendment immunity can be found only when evidenced by the most express language, and must extend explicitly to suits in federal court. (*Leer v. Murphy*, *supra*, 844 F.2d at 632.) With respect to actions against the State of California, and its agencies and officials, the California Tort Claims Act contains no waiver of Eleventh Amendment immunity from suit in federal court. (*Riggle v. State of Cal.*, 577 F.2d 579, 585-586 (9th Cir. 1978).) Nor did Congress, in passing 42 U.S.C. Section 1983, intend to override the states' Eleventh Amendment immunity. (*Will v. Michigan Dept. of State Police*, *supra*, 491 U.S. at 66.)

The Eleventh Amendment's immunity is a jurisdictional bar. (*Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992) (defense of Eleventh Amendment is a jurisdictional bar); *Seaborn v. State of Florida, Dept. of Corrections*, 143 F.3d 1405, 1407 (11th Cir. 1998).) This jurisdictional bar applies regardless of the nature of the relief sought. (*Pennhurst*, 465 U.S. at 100-01; see also *Missouri v. Fiske*, 290 U.S. 18, 27 (1933) ("Expressly applying to suits in equity as well as at law, the [Eleventh] Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State").)

Here, Plaintiff attempts to sue the Medical Board, an agency of the State, in federal court.

1 The Eleventh Amendment, however, bars Plaintiff from doing so. Since the Complaint fails to  
2 state facts sufficient to invoke the Court's subject matter jurisdiction, the Complaint should be  
3 dismissed, with prejudice.

## 4 **II. THIS ACTION IS BARRED BY THE YOUNGER ABSTENTION DOCTRINE**

5 The concern for comity and federalism require federal courts to refrain from interfering in  
6 pending state judicial proceedings where important state interests are involved. (*Hoffman v.*  
7 *Pursue, Ltd.*, 420 U.S. 592 (1975); *Juidice v. Vall*, 430 U.S. 327 (1977).) This doctrine of  
8 abstention (referred to as the Younger Abstention doctrine) applies not only to state criminal and  
9 civil trials, but also to state administrative proceedings that implicate important state interests and  
10 provide a full and fair opportunity to litigate a claim. (See *Younger v. Harris*, 401 U.S. 37  
11 (1971); *Gibson v. Berryhill*, 411 U.S. 564, 576-577 (1982).)

12 State administrative proceedings that accomplish the judicial purpose of providing an  
13 opportunity for the parties to be heard on the facts before a final determination is made by a  
14 neutral magistrate qualify for abstention. (*Ohio v. Middlesex*, 457 U.S. 423, 432-34 (1982)  
15 (abstaining where the federal plaintiff brought suit to enjoin an administrative disciplinary action  
16 brought against him by the state bar's ethics committee).)

17 In the present case, Younger Abstention is appropriate. An administrative adjudication  
18 proceeding is now pending before the Office of Administrative Hearings. An administrative  
19 Accusation against Plaintiff was filed on April 6, 2011. (See accompanying Request for Judicial  
20 Notice, Item 1, Exhibit A.) Pursuant to Cal. Admin. Code, tit. 1, § 1018, a Request to Set a  
21 hearing before an administrative law judge was presented on May 12, 2011. (See accompanying  
22 Request for Judicial Notice, Item 2, Exhibit B.) The administrative adjudication will be heard  
23 before a neutral administrative law judge. (Bus.&Prof. Code § 11502, subd. (a).) Plaintiff will be  
24 afforded a full and fair opportunity to litigate the matter pursuant to the procedural safeguards set  
25 forth in Gov. Code § 11500, et seq., which provide for notice, discovery, reporting of the hearing  
26 by stenographic reporter, the taking of evidence, and the right to examine and cross-examine  
27 witnesses. (Gov. Code §§ 11500-11513.) The final determination resulting from the  
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1 administrative adjudication is subject to judicial state-court review by writ of mandate. (Gov.  
2 Code §§ 11517, 11523; Cal. Code of Civ. Proc. § 1094.5.)

3 Further, the State has an important and substantial interest in protecting the public by  
4 licensing, regulating and disciplining physicians to ensure that they are competent to practice  
5 medicine.

6 Because a state administrative adjudication is now pending, the Younger Abstention  
7 doctrine applies, and this Court should refrain from hearing this matter.

### 8 **III. THE MEDICAL BOARD IS ENTITLED TO ABSOLUTE QUASI-** 9 **PROSECUTORIAL IMMUNITY**

10 “Absolute immunity is generally accorded to judges and prosecutors functioning in their  
11 official capacity.” (*Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004)  
12 (citing *Stump v. Sparkman*, 435 U.S. 349, 364 (1978)); *Imbler v. Pachtman*, 424 U.S. 409, 430-31  
13 (1976).) “This immunity reflects the long-standing general principle of the highest importance to  
14 the proper administration of justice that a judicial officer, in exercising the authority vested in  
15 him, shall be free to act upon his own convictions, without apprehension of personal  
16 consequences to himself.” (*Olsen, supra*, 363 F.3d. at 922 (quoting *Bradley v. Fisher*, 80 U.S.  
17 335 (1871)); see also *Mishler v. Clift*, 191 F.3d 998, 1003 (9th Cir. 1999) (“‘The essential  
18 rationale is that, without protection from retaliatory suits, a judge would lose that independence  
19 without which no judiciary can be either respectable or useful.’ A prosecutor's entitlement to  
20 absolute immunity flows from the performance of activities that are intimately associated with the  
21 judicial process.”).)

22 The Supreme Court has long extended the benefits of this absolute immunity to the  
23 administrative adjudication arena, to immunize State and federal regulators for their actions taken  
24 in bringing license revocation proceedings. (*Butz v. Economou*, 438 U.S. 478, 508-17 (1978)  
25 (federal agriculture officials entitled to absolute immunity for instituting proceedings under the  
26 federal APA to revoke commodities broker's registration, allegedly in retaliation for broker's  
27 criticism of the department); *Olsen, supra*, 363 F.3d at 923 (state medical board entitled to  
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1 absolute quasi-judicial immunity against § 1983 damage claim based on their disciplinary  
2 proceedings and revocation of physician license).)

3 Courts employ a functional approach to determine whether or not an official is entitled to  
4 absolute immunity. (*Mishler, supra*, 191 F.3d at 1003.) “‘Essentially, the court examines the  
5 function performed by the official and determines whether it is similar to a function that would  
6 have been entitled to absolute immunity when Congress enacted § 1983.’” (*Id.* (quoting *Buckley*  
7 *v. Fitzsimmons*, 509 U.S. 259, 268 (1993))).) If the official functions as the equivalent of a judge  
8 or a prosecutor, the official will likely be entitled to absolute immunity for any acts committed in  
9 that role. (*Olsen, supra*, 363 F.3d at 923 (“We must consider whether the actions taken by the  
10 official are functionally comparable to that of a judge or a prosecutor”).)

11 The Supreme Court, in *Butz v. Economou*, 438 U.S. 478 (1978), identified the following  
12 non-exclusive factors that embody “characteristics of the judicial process” and aid in determining  
13 whether to grant absolute immunity: (a) the need to assure that the official can perform his  
14 functions without harassment or intimidation; (b) the presence of safeguards that reduce the need  
15 for private damages actions as a means of controlling unconstitutional conduct; (c) insulation  
16 from political influence; (d) the importance of precedent; (e) the adversary nature of the process;  
17 and (f) the correctability of error on appeal.” (*Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985)  
18 (citing *Butz*, 438 U.S. at 512).)

19 Here, as discussed above, the subject Order Compelling Mental Examination against  
20 Plaintiff constitutes an integral part of the Medical Board’s regulatory enforcement role, and an  
21 initial step in the administrative adjudication process leading to potential discipline. As the Court  
22 of Appeal held in *Olsen*, a state medical board is entitled to absolute quasi-judicial immunity  
23 against a § 1983 damage claim based on its disciplinary proceedings and revocation of a  
24 physician’s license. (*Olsen, supra*, 363 F.3d at 923.)

25 Accordingly, the Medical Board is absolutely immune from suit in this action.

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**CONCLUSION**

For each of the foregoing reasons, defendant Medical Board respectfully requests that the Court grant this motion to dismiss, without leave to amend. Dismissal without leave to amend is appropriate in this case as amendment would be futile. (*See Nunes v. Ashcroft* 348 F.3d 815, 828 (9th Cir. 2003); *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (futility justifies denial of leave to amend); *see also Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1998) (amendment is futile if no set of facts can be proven under the amendment that would constitute a valid claim or defense).)

Dated: May 20, 2011

Respectfully submitted,

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**/s/ WIL FONG**

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